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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

In re METROPOLITAN SECURITIES
LITIGATION

NO. CV-04-025 FVS

CLASS ACTION

THIS DOCUMENT RELATES TO:
ALL ACTIONS

PLAINTIFFS' MEMORANDUM IN
SUPPORT OF MOTION *IN LIMINE* TO
PRECLUDE EVIDENCE AND
ARGUMENT CONCERNING THE SEC'S
FAILURE TO PROCEED AGAINST PwC
IN CONNECTION WITH MET

Hearing Date: March 3, 2010
9:00 a.m.

WITH ORAL ARGUMENT

PLTFS' MEMORANDUM IN SUPP. OF MIL TO
PRECLUDE EVIDENCE & ARGUMENT - 1 of 9
(CV-04-025-FVS)

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I. PRELIMINARY STATEMENT

Plaintiffs anticipate that PwC will seek to introduce evidence or advance argument at trial that the Securities and Exchange Commission ("SEC") did not elect to bring an enforcement action against PwC in connection with the Metropolitan Group and that non-action is probative of PwC's liability. But the case law clearly prohibits such evidence or argument on the grounds that it is irrelevant and would be prejudicial and potentially misleading to the jury.

II. ARGUMENT

Section 23 of the Securities Act entitled "Unlawful Representations" provides clearly that:

Neither the fact that the registration statement for a security has been filed or is in effect, nor the fact that a stop order is not in effect with respect thereto shall be deemed a finding by the Commission that the registration statement is true and accurate on its face or that it does not contain an untrue statement of fact or omit to state a material fact, or be held to mean that the Commission has in any way passed upon the merits of, or given approval to, such security. It shall be unlawful to make, or cause to be made, to any prospective purchaser any representation contrary to the foregoing provisions of this section.

15 U.S.C. § 77w.

This language refers to Section 8(d) of the Securities Act that authorizes the SEC to issue a stop order to the effect that sales of securities

PLTFS' MEMORANDUM IN SUPP. OF MIL TO
PRECLUDE EVIDENCE & ARGUMENT - 2 of 9
(CV-04-025-FVS)

[1459275 v12.doc]

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1 under an effective Registration should cease due to material
2 misrepresentations and omissions in the Registration Statement.
3 Historically, this provision has not been frequently utilized largely because
4 the Division of Corporation Finance is not in a position to make a case on the
5 record shortly after a Registration Statement is declared effective. This
6 language of Section 23 simply provides that no conclusions as to a
7 Registration Statement can be drawn from the fact that the SEC did not
8 authorize a stop order proceeding.
9

10 Section 26 of the Securities Exchange Act of 1934 ("Exchange Act")
11 also entitled "Unlawful Representations" contains an even broader
12 prohibition precluding any reference to actions or inactions by the SEC.

13 15 U.S.C. § 78z, states:

14 no action or failure to act by the [SEC] . . . shall be
15 construed to mean that [the SEC] has in any way
16 passed upon the merits of, or given approval to, any
17 security . . . , nor shall such action or failure to act
18 with regard to any statement or report filed [with the
19 SEC] . . . be deemed a finding by [the SEC] such
20 statement is true and accurate on its face or that it
21 is not false or misleading. It shall be unlawful to
22 make, or cause to be made, to any prospective
purchaser or seller of a security any representation
that any such action or failure to act by any such
authority is to be construed.

23 These provisions reflect the disclosure philosophy of the Securities Act
24 as stated by President Franklin D. Roosevelt in a letter to Congress, dated
25

26 PLTFS' MEMORANDUM IN SUPP. OF MIL TO
PRECLUDE EVIDENCE & ARGUMENT - 3 of 9
(CV-04-025-FVS)

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1 29 March 1933, recommending the legislation that became the Securities
2 Act:

3
4 Of course, the Federal Government cannot and
5 should not take any action which might be
6 construed as approving or guaranteeing that newly
7 issued securities are sound in the sense that their
value will be maintained or that the properties which
they represent will earn profits.

8 H.R. Rep. No. 85, "Federal Supervision Of Traffic In Investment Securities In
9 Interstate Commerce," 73d Cong. 1st Sess. at 2-3 to 2-4 (3 May 1933).

10 These provisions of the Securities Act and the Exchange Act could not
11 be clearer with regard to whether the SEC's actions or inactions are
12 probative of the contents of a registration statement and the liability of those
13 who prepared or certified any of its contents. The SEC simply does not verify
14 the factual accuracy of registration statements and their associate financial
15 statements. Under the statutory provisions quoted above, it makes no
16 difference whether the SEC staff commented on the registration statements
17 or initiated or elected not to initiate an enforcement action against those
18 involved. The statutes clearly provide that no one can represent or intimate
19 that the SEC approved a security or passed on the merits of the security in
20 any respect or context.

21
22 The federal securities laws and case law make clear that any effort by
23 defense counsel to make any statement to the jury implying that SEC
24 inaction against a defendant indicates that the Plaintiff's case lacks merit is
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26 PLTFS' MEMORANDUM IN SUPP. OF MIL TO
PRECLUDE EVIDENCE & ARGUMENT - 4 of 9
(CV-04-025-FVS)

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1 prohibited. *Abromson v. American Pacific Corp.*, 114 F.3d 898, 903 (9th Cir.
 2 1997) (SEC inaction does not support any inference as to defendant's
 3 culpability); *cf. Johnson v. Elk Lake School Dist.*, 283 F.3d 138, 147 (3d Cir.
 4 2002) ("evidence of non-arrest, like evidence of non-prosecution or acquittal
 5 of a crime, is generally inadmissible in a civil trial concerning the same
 6 incident," because "the probative value of evidence of non-arrest is very
 7 limited" and there is a "danger of the jury in a civil trial exaggerating its
 8 worth"); *Kelly's Auto Parts, No. 1, Inc. v. Boughton*, 809 F.2d 1247, 1252
 9 (6th Cir. 1987) (evidence of party's non-prosecution on criminal charges was
 10 inadmissible in a civil case, and was "highly prejudicial" to the issue of
 11 whether the party had in fact violated the law); *American Home Assurance*
 12 *Co. v. Sunshine Supermarket, Inc.*, 53 F.2d 321, 325 (3d Cir. 1985)
 13 ("prosecutorial discretion may take into account many other factors not
 14 relevant in a civil suit. At best, the evidence of non-prosecution is evidence
 15 of an opinion by the prosecutor").
 16

17 The law is clear that whether or not the SEC or any other government
 18 agency in exercising its discretion decided not to bring charges or claims
 19 against PwC in connection with the Metropolitan Group is not probative of
 20 any element of this Section 11 case. Further, any probative value of such
 21 evidence is substantially outweighed by unfair prejudice or confusion of the
 22 jury and is further prohibited under Federal Rule of Evidence 403.
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26 PLTFS' MEMORANDUM IN SUPP. OF MIL TO
 PRECLUDE EVIDENCE & ARGUMENT - 5 of 9
 (CV-04-025-FVS)

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III. CONCLUSION

Accordingly, Plaintiffs request that the Court order Defendant PwC not to argue, comment or seek to offer evidence concerning the SEC's failure to file an enforcement action against PwC.

Dated this 16th day of February 2010.

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PLTFS' MEMORANDUM IN SUPP. OF MIL TO
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(CV-04-025-FVS)

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CERTIFICATE OF SERVICE

I hereby certify that on February 16, 2010, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system. The Court or the CM/ECF system will send notification of such filings to the CM/ECF participants listed below, and I will mail the same via U.S. Postal Service to the non-CM/ECF participant(s).

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PLTFS' MEMORANDUM IN SUPP. OF MIL TO
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(CV-04-025-FVS)

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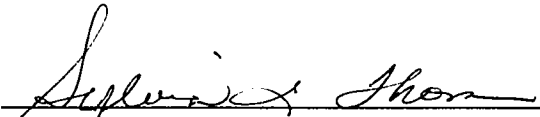
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26 PLTFS' MEMORANDUM IN SUPP. OF MIL TO
PRECLUDE EVIDENCE & ARGUMENT - 8 of 9
(CV-04-025-FVS)

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PLTFS' MEMORANDUM IN SUPP. OF MIL TO
PRECLUDE EVIDENCE & ARGUMENT - 9 of 9
(CV-04-025-FVS)

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